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Tricks Prosecutors Play

Bennett L. Gershman
Elisabeth Haub School of Law at Pace University, bgershman@law.pace.edu

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Criminal defense lawyers must recognize and challenge prosecutorial misconduct whenever it occurs. In my opinion, prosecutors today wield greater power, engage in more egregious misconduct, and are less subject to judicial or bar association oversight than ever before. Few defense lawyers or commentators would disagree with these conclusions. Indeed, some types of prosecutorial misconduct have become almost "normative to the system."[1]

This is not to say, of course, that private attorneys do not engage in similar misconduct. They do. There are, however, important differences between prosecutors and defense attorneys that make prosecutorial violations much more insidious.

Prosecutors are generally perceived by juries as prestigious and honorable "champions of justice." They have powerful strategic and financial resources that usually give them distinct advantages over their adversaries. And prosecutors operate under higher ethical standards than other lawyers—i.e., a special obligation "to seek justice."[2] Despite or because of these differences, prosecutorial misconduct is all too often overlooked, condoned, or found to be harmless.[3]

Prosecutors function in a variety of contexts in the criminal justice system. They enjoy vast decision-making powers in areas such as charging crimes, plea bargaining, granting immunity, summoning witnesses to grand juries, and determining sentences. Prosecutorial domination over the "awful instruments of the criminal law," to use Justice Felix Frankfurter's apt terminology,[4] is largely uncontrolled by the courts.[5] Indeed, unfettered prosecutorial discretion may be the most terrifying and the most insoluble problem in the administration of criminal justice.

That problem, however, is beyond the scope of this article. The focus here is on prosecutorial misconduct at trial that results in depriving the defendant of a fair and reliable determination of guilt.

While the incidence of misconduct is increasing, judges' willingness to impose remedies such as reversal of convictions or dismissal of charges is decreasing. This is not an anomaly. There is a direct correlation between this laissez faire judicial attitude and the escalation of prosecutorial misconduct.

Just as the threat of penal sanctions is thought to deter illegal behavior by criminals, the prospect of judicial sanctions such as reversals, dismissals, or contempt citations would be expected to deter errant behavior by rational prosecutors. However, since "winning the war on crime" is a major political preoccupation today, the procedural safeguards and prohibitions set up to ensure that defendants get fair trials may be seen by some as retarding progress toward that goal.

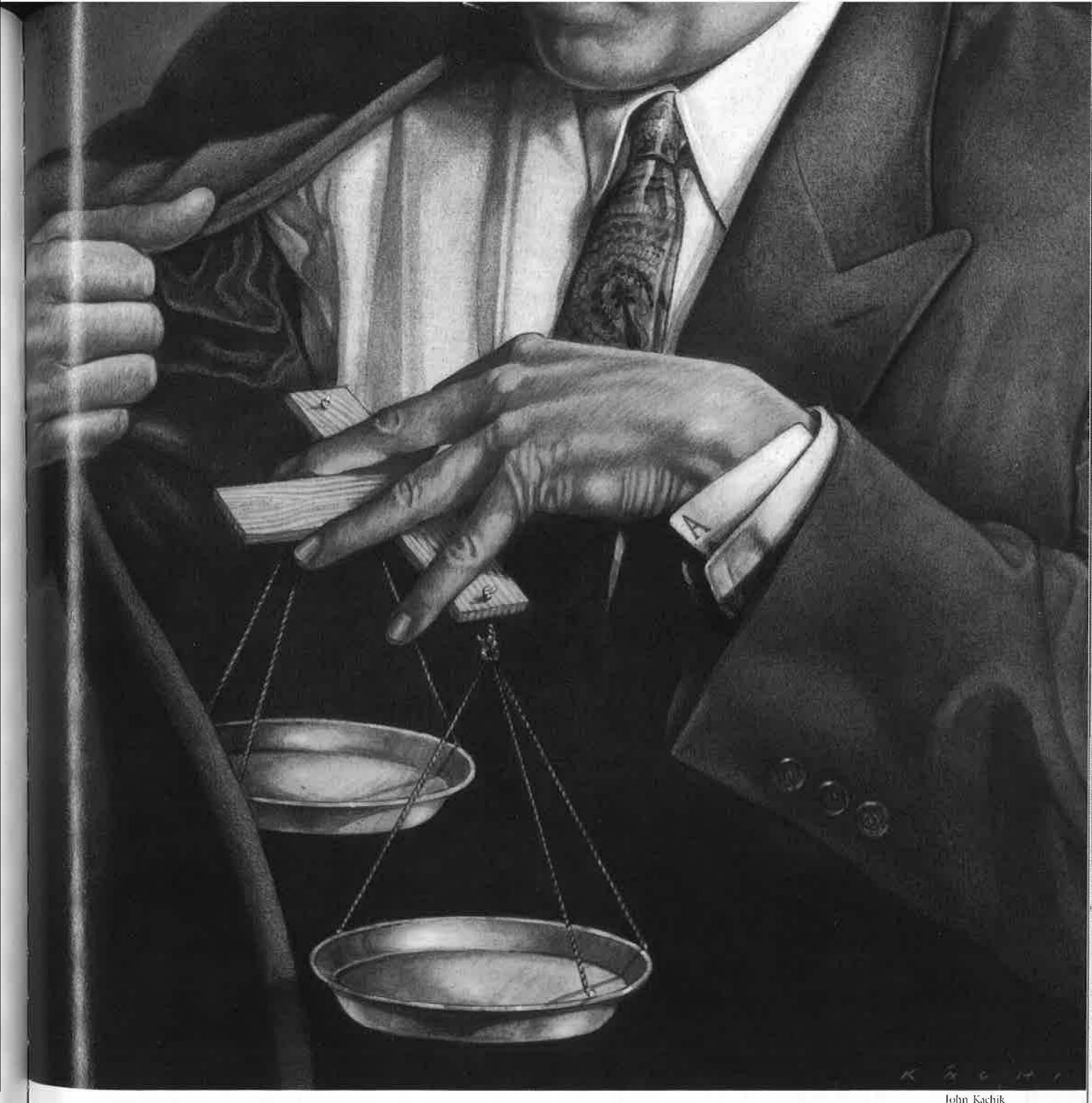
It is therefore not surprising that to affirm convictions despite prosecutorial misconduct, appellate courts increasingly invoke a variety of questionable procedures. These include broadening use of harmless-error review, overlooking misconduct that was allegedly "invited" by defense counsel, ignoring misconduct to which defense counsel failed to object, or indulging in the fiction that so-called "curative instructions" by the trial judge actually mitigate the harm.

By the same token, access to collateral review through the writ of habeas corpus is gradually being eroded through doctrinal and procedural bars. Examples of these barriers include exhaustion, default, waiver, and the need to show prejudice.

This is not to say that trial or appellate courts are completely insensitive to prosecutorial excesses. Some trial judges monitor prosecutors quite closely—particularly those with track records of behaving overzealously. Some appellate courts also keep watch on prosecutors. And some bar association officials bring disciplinary charges against prosecutors for egregious trial behavior.

Having said this, I will now turn to a discussion of some of the more egre-

Bennett L. Gershman, formerly an assistant district attorney, New York County, and a special assistant to the New York State attorney general, is author of Prosecutorial Misconduct *(1991). He teaches at Pace University School of Law.*



John Kachik

gious "trial tricks" that prosecutors sometimes play.

Assassinating Defendant's Character

Attacking a defendant's character makes a conviction more likely. The devastating impact on a jury of a defendant's prior criminal or sordid acts is clear and has been empirically proven.[6] Consider the William Kennedy Smith rape trial in Florida. Had the prosecution been able to place before the jury evidence that Smith had engaged in three prior episodes of sexual misconduct, the verdict might have been different.

Prosecutors have portrayed defendants as dangerous, sinister, and undesirable characters who are therefore more likely to have committed the crime charged, and convictions occasionally are reversed because of such misconduct.[7] Attempting to insinuate that a defendant was guilty by showing that he had associated with, was related to, or was in the company of criminals is improper.[8] So is stigmatizing defendants either directly (through cross-examination)[9] or indirectly (through extrinsic proof)[10] by intimating that the defendant has a criminal record and therefore is more likely to have committed the crime charged.

Introducing Improper Evidence

Presenting false, misleading, or inadmissible evidence is unethical and potentially violates due process.[11] Examples of this practice include using perjured testimony[12] and introducing physical or other evidence that deceives the jury

about a material fact.[13] It is also unethical for prosecutors to seek to make a false impression on the jury by loading questions with innuendos when no supporting evidence exists.[14] Suggesting without any factual basis that defendant's wife left him because of his drug transactions is an example of such a bad-faith question.[15]

Similarly, referring to polygraph tests,[16] withdrawn guilty pleas,[17] or guilty pleas of co-conspirators[18] may be an improper tactic deliberately designed to distort the fact-finding process against the defendant. Forcing a defendant or defense witness under cross-examination to characterize the testimony of a prosecution witness as "lies" is a frequently used tactic that invites appellate censure.[19]

Inflaming Juror Prejudice

Prosecutors know that appeals to the jury's passions and prejudices, although improper, may skew the jury's evaluation of the proof[20] toward conviction. To that end, prosecutors have displayed inflammatory and inadmissible physical evidence before juries;[21] offered gruesome and irrelevant photographs of the victim;[22] elicited inflammatory testimony;[23] and injected gratuitous, inflammatory rhetoric into the proceedings.[24]

Summation gives the prosecutor a unique opportunity to prejudice the defendant. Common examples of inflammatory argument include exhorting juries to win the war on crime;[25] inciting them to vengeance;[26] using insulting and abusive epithets and invective to describe the defendant;[27] appealing to racial, ethnic, national, or religious prejudice;[28] appealing to wealth and class bias;[29] and imputing to the defendant violence and threats against witnesses.[30]

Violating the Privilege Against Self-Incrimination

It is improper for a prosecutor to encourage the jury to infer guilt from the defendant's silence at trial[31] or failure to explain his conduct to the police after arrest.[32] This tactic has been used to impeach a defendant's testimony at trial[33] and to argue that if the defendant was innocent, he would have testified, but because he has not, he is guilty.

Appellate reversal is more likely when the prosecutor's comments refer directly to the defendant's failure to testify.[34] Prosecutors therefore try to make the point more subtly, through oblique references to the government's proof being "uncontradicted,"[35] "unrefuted,"[36] or "undenied."[37] Although the prosecutor's intent here is clear, such references often escape appellate sanction.

Comments about the defendant's failure to call witnesses should also be closely scrutinized to determine whether they involve a prohibited comment on the privilege against self-incrimination.[38]

Denigrating Defense Counsel

Attacks on defense counsel are not unusual. By belittling defense counsel, prosecutors may believe that they can gain an advantage before the jury. Some prosecutors disparage the defense by suggesting that defense counsel's objections were made in bad faith.[39] Another tactic is to insinuate that defense counsel does not believe the client's testimony or has no confidence in the case.[40]

Personal attacks on defense counsel's ethics and integrity are not uncommon. Prosecutors have insinuated that defense counsel presented "contrived testimony,"[41] "fabricated a defense,"[42] or engaged in illegal conduct.[43]

Some jurisdictions allow prosecutors to make an opening summation and then a rebuttal summation. Some courts have recognized a phenomenon known as "sandbagging," where the prosecutor makes new arguments and raises new theories for the first time during rebuttal summation.[44] Courts look with disfavor on this practice when it unfairly takes defense counsel by surprise.

Exploiting Prosecutorial Prestige

It is unethical for prosecutors to manipulate the jury's evaluation of the evidence by stressing their own personal integrity and the prestige of their office.[45] Prosecutors disregard this rule when they try to enhance a witness's credibility by expressing their own faith in the witness's truthfulness[46] or the defendant's guilt.[47] This personal vouching makes the prosecutor an unsworn witness.

Insinuating that information outside the record verifies the witness's truthfulness is another form of improper vouching.[48] So is suggesting that cooperation agreements with witnesses show that the prosecutor knows what the truth is and that by entering into such an agreement with the witness, the prosecutor is ensuring that the truth will be revealed.[49]

Misrepresenting the Record

It is improper for prosecutors to refer to matters outside the record;[50] to point to exhibits or testimony that have not been entered into evidence, implying

they are incriminating;[51] to misrepresent the record;[52] or to insinuate that issues of fact have already been decided.[53] Prosecutors have also been rebuked for going outside the record and commenting on the consequences that might result from the jury's verdict.[54] These comments are intended to lessen the jurors' sense of responsibility and recognition of the seriousness of their verdict. Impermissible remarks include references to the possibility of mitigation of punishment by the judge,[55] the availability of pardon or executive clemency,[56] and the availability of appellate review.[57]

Finding Remedies

Sanctions for prosecutorial misconduct are infrequent. Appellate reversal is seen as too costly to society.[58] Judge Learned Hand's argument is endorsed by most courts. Referring to a prosecutor's misconduct, Judge Hand wrote, "That was plainly an improper remark, and if reversal would do more than show our disapproval, we might reverse. Unhappily, it would accomplish little towards punishing the offender, and would upset the conviction of a plainly guilty man. . . . It seems to us that reversal would be an immoderate penalty."[59]

Civil damage actions against prosecutors are usually unsuccessful because of the doctrine of prosecutorial immunity.[60] Contempt sanctions are rarely employed,[61] and professional discipline is even more rarely utilized.[62]

In such a climate of opinion, effectively challenging prosecutorial misconduct at the trial level becomes more important all the time. It requires, first, a thorough understanding of the substantive rules governing the parameters of prosecutorial behavior; second, an alertness to conduct that violates those rules; and third, the ability to make a record through timely objection or by other means. Valid claims are frequently lost through the failure of trial counsel to register a timely protest.

Knowing from the outset that prosecutorial misconduct may occur allows defense counsel to make an advance motion such as a motion in limine to prevent such misconduct before it occurs. These motions have been made when defense counsel knows that a particular prosecutor has a track record of engaging in specific types of misbehavior—for example, asking questions without any evidentiary foundation, eliciting inadmissible and inflammatory evidence such as prior bad acts by the defendant,

or using particularly inflammatory language in argument to the jury.

Many defense lawyers are reluctant to antagonize prosecutors with whom they have to deal on a regular basis. However, making a formal complaint with a state or local bar association or with the U.S. Department of Justice's Office of Professional Responsibility may be not only an appropriate and effective recourse, but the best when prosecutorial misconduct occurs. □

Notes

1 Steele, *Unethical Prosecutors and Inadequate Discipline*, 38 S.W. L.J. 965, 975 (1984).

2 ABA STANDARDS FOR CRIMINAL JUSTICE §3-1.1(c) (2d ed. 1986 Supp.) [hereafter ABA STANDARDS]; ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1983).

3 *See generally* B. GERSHMAN, PROSECUTORIAL MISCONDUCT (1985).

4 McNabb v. United States, 318 U.S. 332, 343 (1943).

5 A. GOLDSTEIN, THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION AND THE GUILTY PLEA 5 (1981).

6 H. KALVEN & H. ZEISEL, THE AMERICAN JURY 160 (1966).

7 *See, e.g.*, United States v. Fortenberry, 860 F.2d 628 (5th Cir. 1988), *cert. denied*, 111 S. Ct. 1333 (1991); United States v. Shelton, 628 F.2d 54 (D.C. Cir. 1980); People v. Stewart, 459 N.Y.S.2d 853 (1983).

8 United States v. Romo, 669 F.2d 285 (5th Cir. 1982); State v. Austin, 769 P.2d 1098 (Haw. 1989).

9 United States v. Larsen, 596 F.2d 347 (9th Cir. 1979); Williams v. Henderson, 451 F. Supp. 328 (E.D.N.Y.), *aff'd*, 584 F.2d 974 (2d Cir. 1978), *cert. denied sub nom.* Solberg v. Henderson, 441 U.S. 911 (1979).

10 United States v. Torres-Flores, 827 F.2d 1031 (5th Cir. 1987); Ingram v. State, 755 P.2d 120 (Okla. Crim. App. 1988).

11 ABA STANDARDS, *supra* note 2, §3-5.6; Miller v. Pate, 386 U.S. 1 (1967).

12 Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959); Mooney v. Holohan, 294 U.S. 103 (1935).

13 *Miller*, 386 U.S. 1; United States v. Kessler, 530 F.2d 1246 (5th Cir. 1976); MacLaird v. State, 718 P.2d 41 (Wyo. 1986); *see also* United States v. Green, 636 F.2d 925 (4th Cir. 1980), *cert. denied*, 451 U.S. 929 (1981).

14 ABA STANDARDS, *supra* note 2, §§3-5.6(b), 3-5.7(d). *See* United States v. Elizondo, 920 F.2d 1308 (7th Cir. 1990); People v. Sandy, 499 N.Y.S.2d 75 (1986); People v. DiPaolo, 115 N.W.2d 78 (Mich. 1962).

15 United States v. Hughes, 658 F.2d 317 (5th Cir. 1981).

16 Commonwealth v. Kemp, 410 A.2d 870 (Pa. Super. Ct. 1979); State v. Kilpatrick, 578 P.2d 1147 (Kan. 1978); People v. Brocato, 169 N.W.2d 483 (Mich. 1969).

17 Kercheval v. United States, 274 U.S. 220 (1027); United States v. Robertson, 582 F.2d 1356 (5th Cir. 1978); Mathis v. State, 245 S.E.2d 41 (Ga. Ct. App. 1978).

18 United States v. Handley, 591 F.2d 1125 (5th Cir. 1979); People v. Sullivan, 377 N.E.2d 17 (Ill. 1978).

19 United States v. Richter, 826 F.2d 206 (2d Cir. 1987); Freeman v. United States, 495 A.2d 1183 (D.C. 1985); People v. Montgomery, 481 N.Y.S.2d 532 (1984).

20 ABA STANDARDS, *supra* note 2, §§3-5.6(c); 3-5.8(c).

21 *See, e.g.*, *Miller* 386 U.S. 1; *Kessler*, 530 F.2d 1246; State v. Scarlett, 426 A.2d 25 (N.H. 1981).

22 Commonwealth v. McCutchen, 417 A.2d 1270 (Pa. Super. Ct. 1979); Berry v. State, 718 S.W.2d 447 (Ark. 1986).

23 United States v. Millen, 594 F.2d 1085 (6th Cir.), *cert. denied*, 444 U.S. 829 (1979); People v. Bagarozy, 522 N.Y.S.2d 848 (1987); State v. Spicer, 245 S.E.2d 922 (W. Va. 1978); McBride v. State, 338 So. 2d 567 (Fla. Dist. Ct. App. 1976).

24 United States v. Singleterry, 646 F.2d 1014 (5th Cir. 1981); Petrocelli v. Smith, 544 F. Supp. 627 (W.D.N.Y. 1982).

25 Lesko v. Lehman, 925 F.2d 1527 (3d Cir.), *cert. denied*, 112 S. Ct. 273 (1991); Sanborn v. Commonwealth, 754 S.W.2d 534 (Ky. 1988).

26 Dean v. Commonwealth, 777 S.W.2d 900 (Ky. 1989); Reed v. United States, 403 A.2d 725 (D.C. 1979); People v. Brown, 405 N.Y.S.2d 691 (App. Div. 1978), *aff'd*, 48 N.Y.2d 921 (1979).

27 Darden v. Wainwright, 477 U.S. 168 (1986); United States v. Goodwin, 492 F.2d 1141 (5th Cir. 1974); State v. Gamez, 696 P.2d 1327 (Ariz. 1985).

28 Viereck v. United States, 318 U.S. 236 (1943) (appeal to national prejudice); MacFarland v. Smith, 611 F.2d 414 (2d Cir. 1979) (appeal to racial prejudice); Ross v. United States, 180 F.2d 160 (6th Cir. 1950) (appeal to ethnic prejudice); Ballard v. United States, 152 F.2d 941 (9th Cir. 1945) (appeal to religious prejudice), *rev'd*, 329 U.S. 187 (1946).

29 Sizemore v. Fletcher, 921 F.2d 667 (6th Cir. 1990); United States v. Stahl, 616 F.2d 30 (2d Cir. 1980).

30 United States v. Rios, 611 F.2d 1335 (10th Cir. 1979), *cert. denied*, 452 U.S. 918 (1981); State v. Williams, 346 S.E.2d 405 (N.C. 1986); People v. Ashwal, 39 N.Y.2d 105 (1976).

31 Griffin v. California, 380 U.S. 609 (1965).

32 Doyle v. Ohio, 426 U.S. 610 (1976).

33 United States v. Shue, 740 F.2d 971 (7th Cir. 1980) (unpublished); People v. Conyers, 49 N.Y.2d 174 (1980), *vacated*, 449 U.S. 809 (1980).

34 United States v. Rodriguez, 627 F.2d 110 (7th Cir. 1980); People v. Bates, 396 N.Y.S.2d 469 (App. Div. 1977); *see also* State v. Macomber, 524 P.2d 574 (Ore. Ct. App. 1974).

35 Burke v. Greer, 756 F.2d 1295 (7th Cir. 1985); United States v. Flannery, 451 F.2d 880 (1st Cir. 1971).

36 United States v. Guiliano, 383 F.2d 30 (3d Cir. 1967); *see also* United States v. Palacios, 612 F.2d 972 (5th Cir. 1980) (proof "uncontroverted"); United States v. Goldman, 563 F.2d 501 (1st Cir. 1977) (proof "uncontested"), *cert. denied*, 434 U.S. 1067 (1978).

37 *Burke*, 756 F.2d 1295; Gore v. State, 226 So. 2d 674 (Ala. Ct. App. 1969); *see also* United States v. Hooker, 541 F.2d 300 (1st Cir. 1976) (proof "unimpeached"); United States v. Fearns, 501 F.2d 486 (7th Cir. 1974) (proof "undisputed").

38 United States v. Williams, 739 F.2d 297 (7th Cir. 1984); People v. Murray, 407 N.Y.S.2d 890 (1978).

39 People v. Sanders, 238 N.E.2d 180 (Ill. App. Ct. 1968) (unpublished); Commonwealth v. Balakin, 254 N.E.2d 422 (Mass. 1969); Sharp v. State, 421 S.W.2d 663 (Tex. Crim. App. 1967).

40 United States v. Kirkland, 637 F.2d 654 (9th Cir. 1980); Bates v. United States, 403 A.2d 1159 (D.C. Ct. App. 1981); People v. Rivera, 501 N.Y.S.2d 817 (1986); Scalf v. State, 424 N.E.2d 1084 (Ind. 1981).

41 *Sizemore*, 921 F.2d 667; *Rios*, 611 F.2d 1335.

42 People v. Emerson, 455 N.E.2d 41 (Ill. 1983), *appeal after remand*, 522 N.E.2d 1109 (Ill. 1987), *cert. denied*, 488 U.S. 900 (1988).

43 Bruno v. Rushen, 721 F.2d 1193 (9th Cir. 1983), *cert. denied sub nom.* McCarthy v. Bruno, 469 U.S. 920 (1984); United States v. McDonald, 620 F.2d 559 (5th Cir. 1980); Chamberlain v. State, 247 So. 2d 683 (Ala. 1971).

44 Moore v. United States, 344 F.2d 558 (D.C. Cir. 1965); Coreas v. United States, 565 A.2d 594 (D.C. App. 1989).

45 ABA STANDARDS, *supra* note 2, §3-5.8(b).

46 United States v. DiLoreto, 888 F.2d 996 (3d Cir. 1989); Newlon v. Armentrout, 885 F.2d 1328 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 3301 (1990); United States v. Modica, 663 F.2d 1173 (2d Cir. 1980); United States v. Garza, 608 F.2d 659 (5th Cir. 1979); People v. Lee, 433 N.Y.S.2d 610 (App. Div. 1980).

47 *Newlon*, 885 F.2d 1328; Soap v. Carter, 632 F.2d 872 (10th Cir. 1980), *cert. denied*, 451 U.S. 939 (1981); Phelps v. State, 360 N.E.2d 191 (Ind. 1977).

48 United States v. Wiley, 534 F.2d 659 (6th Cir.), *cert. denied sub nom.* O'Donnell v. United States, 425 U.S. 995 (1976); Gradsky v. United States, 373 F.2d 706 (5th Cir. 1967); People v. Jackson, 10 N.Y.2d 510 (1962).

49 United States v. Roberts, 618 F.2d 530 (9th Cir. 1980), *cert. denied*, 452 U.S. 942 (1981); *but see* United States v. Arroyo-Angulo, 580 F.2d 1137 (2d Cir.), *cert. denied*, 439 U.S. 913 (1978).

50 Jones v. United States, 512 A.2d 253 (D.C. Ct. App. 1986); People v. Ellison, 350 N.W.2d 812 (Mich. Ct. App. 1984).

51 *Emerson*, 455 N.E.2d 41; Joyner v. State, 436 S.W.2d 141 (Tex. Crim. App. 1968).

52 *Miller*, 386 U.S. 1; United States v. Dorr, 636 F.2d 117 (5th Cir. 1981); People v. Morales, 383 N.Y.S.2d 620 (1976).

53 United States v. Lewis, 423 F.2d 457 (8th Cir.), *cert. denied*, 400 U.S. 905 (1970); People v. Sandy, 499 N.Y.S.2d 75 (1986); *see also* United States v. Sullivan, 919 F.2d 1403 (10th Cir. 1990).

54 Caldwell v. Mississippi, 472 U.S. 320 (1985).

55 People v. Martin, 393 N.E.2d 508 (Ill. 1979); Fryson v. State, 301 A.2d 211 (Md. 1973).

56 State v. Stutts, 723 S.W.2d 594 (Mo. 1987), *appeal after remand*, 756 S.W.2d 627 (Mo. 1988); Tucker v. Kemp, 762 F.2d 1496 (11th Cir.) *on remand to* 776 F.2d 1487 (11th Cir.), *reh'g denied*, 780 F.2d 1033 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 3340 (1986); Jones v. State, 707 P.2d 1128 (Nev. 1985); People v. Varnum, 392 P.2d 961 (Cal. 1964).

57 *Caldwell*, 472 U.S. 320; State v. Jones, 251 S.E.2d 425 (N.C. 1979).

58 *Modica*, 663 F.2d 1173.

59 United States v. Lotsch, 102 F.2d 35, 37 (2d Cir. 1939).

60 Imbler v. Pachtman, 424 U.S. 409 (1976); Burns v. Reed, 111 S. Ct. 1934 (1991).

61 *But see* Brostoff v. Berkman, 566 N.Y.S.2d 927 (1991); *In re* Contempt Adjudication of the Broward County State Attorney's Office, 577 So. 2d 967 (Fla. 1991).

62 *See* Steele, *supra* note 1.